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No. 99-830

Supreme Court, U.S.
FILED

Feb 17 2000

FEB 17 2000

IN THE

Supreme Court of the United States

CLERK

OCTOBER TERM, 1999

DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF FEMINISTS FOR LIFE OF AMERICA; MASSACHUSETTS CITIZENS FOR LIFE, INC.; PRO-LIFE LEGAL DEFENSE FUND, INC.; AND UNIVERSITY FACULTY FOR LIFE IN SUPPORT OF PETITIONERS

MARY ANN GLENDON
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4769

MARYCLARE FLYNN
529 Main Street
Boston, MA 02129

DWIGHT G. DUNCAN
Counsel of Record
333 Faunce Corner Road
North Dartmouth, MA 02747-1252
(508) 998-9600 ext. 124

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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This *amici curiae* brief respectfully is submitted on behalf of Feminists for Life of America, Massachusetts Citizens for Life, Inc., Pro-Life Legal Defense Fund, Inc., and University Faculty for Life in support of Petitioners and in favor of reversal of the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 24, 1999. Pursuant to Rule 37.3 of the Rules of this Court, *Amici* have obtained and file herewith the written consent of each of the parties to the filing of this brief.

INTEREST OF THE AMICI CURIAE

Feminists for Life of America ("FFL") is a non-sectarian, grassroots organization incorporated in Delaware in 1972 that seeks true equality for all human beings, particularly women. FFL opposes all forms of violence, in accord with the core feminist principles of justice, non-violence, and non-discrimination. FFL is dedicated to securing basic human rights for all people, especially women and children, from conception until the natural end of life. Among its members are women who oppose the D&X method of abortion as a threat to the lives of women and children. By filing this brief, FFL seeks to advance its general interest in promoting basic human rights, including, but not limited to, the right to life, for all people, especially women and children.

Massachusetts Citizens for Life, Inc. ("MCFL") is a Massachusetts non-profit, grassroots corporation organized to affirm in the public domain the value of all human life from conception to

natural death. Its members include a broad spectrum of citizens from all walks of life. MCFL engages in educational and legislative efforts related to fostering respect for human life and defending the right to life of all human beings, born and unborn. MCFL is presently involved in an effort to ban the D&X procedure in the state of Massachusetts. For these reasons, the issues involved in this case are of acute interest to MCFL.

The Pro-Life Legal Defense Fund, Inc., is a Massachusetts not-for-profit corporation composed of lawyers who provide pro-bono legal services to those engaged in the defense of human life from conception to natural death.

University Faculty for Life is a nonprofit organization incorporated in the District of Columbia and composed of North American University Professors from many disciplines who seek to promote research, dialogue, and publication on the value of human life from its inception to natural death.

SUMMARY OF ARGUMENT

Our system of government is built upon the principles of federalism and separation of powers. It is in the face of divisive and fiercely-debated questions like abortion that these foundational principles are most clearly implicated and, consequently, where abandonment of these principles is most dangerous. The Eighth Circuit's failure to allow for a reasonable narrowing interpretation, its unwillingness to defer to the interpretation of the Nebraska Attorney General, and its willingness to substitute the factual findings of a single court for those of the Nebraska Legislature demonstrate a disregard for federalism and separation of powers that this Court should correct.

First, federal courts should refrain from declaring state statutes facially unconstitutional if a reasonable statutory construction exists. In this case, the lower courts held that the phrase "substantial portion" was so broad that it necessarily encompasses not only Dilation and Extraction (D&X) abortions, but also the more common Dilation and Evacuation (D&E) abortions. In reaching this conclusion, both the District Court and the Eighth Circuit erred by disregarding the possibility that "substantial portion" could reasonably be construed to ban only D&X, or partial birth, abortions. In fact, numerous decisions—both by this Court and by lower courts—have used the word "substantial" to mean "nearly all." This commonplace meaning of "substantial" would limit the statute to a prohibition of the D&X abortion procedure alone, in which nearly all of the fetus is extracted before being killed.

Second, the lower courts accorded no deference to the Nebraska Attorney General's interpretation of the statute, an interpretation that would cabin the statute to its intended purpose of proscribing only the D&X procedure. By virtue of his position, the Attorney General has a unique familiarity with the framing and adoption of this statute, and to adopt his interpretation would demonstrate the comity that our federalism urges. Both the district court and the court of appeals possessed the authority to make the Attorney General's interpretation binding upon all the parties by enjoining them from enforcing the statute against D&E abortions.

Third, the District Court improperly overruled the legislature's finding of fact on the basis of the limited trial testimony presented in court by a few experts. As this Court has recognized, legislatures have a special institutional capacity to research, analyze, and weigh empirical data, particularly in medical and scientific areas. The Nebraska Legislature determined that the D&X procedure is never medically necessary. In the face of this finding, and given the availability of several safe and widely-accepted alternative methods of abortion, banning D&X, either with or without a health exception, does not create an undue burden under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

ARGUMENT

I. CONTRARY TO WELL-ESTABLISHED CANONS OF STATUTORY INTERPRETATION, THE EIGHTH CIRCUIT REJECTED A REASONABLE NARROWING INTERPRETATION.

Although the Eighth Circuit acknowledged its "duty to give [the statute] a construction, if reasonably possible, that would avoid constitutional doubts," the court's construction of the statute disregarded the reasonable possibility that the words "substantial portion" indicate a portion of the fetus sufficiently large so as to exclude the D&E procedure from coverage under the statute. *Carhart v. Stenberg*, 192 F.3d 1142, 1150 (CA8 1999). In concluding that "substantial portion" must encompass a mere arm or a leg, the Eight Circuit ignores this Court's precedent, Eighth Circuit precedent, and the Eighth Circuit's demonstrated understanding of the Nebraska Supreme Court's use of the term "substantial."

When this Court considered the term "substantial" in *Pierce v. Underwood*, 487 U.S. 552 (1988), eight members of this Court[1] agreed that

> the word "substantial" can have two quite different -- indeed almost contrary -- connotations. On the one hand, it can mean "considerable in amount, value or the like; large" -- as, for example, in the statement, "He won by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," as, for example, in the statement, "What he said was substantially true."

Id. at 564 (internal citations omitted); *see also id.* at 576 (Brennan, J. concurring in part and concurring in the judgment) (quoting the Court's language with approval); *id.* at 584 (White, J., concurring in part and dissenting in part) (concurring in the relevant portion of the Court's opinion); Webster's Ninth New Collegiate Dictionary 1176 (1991) (listing "being largely but not wholly the thing specified" as a definition of "substantial").

Nebraska argues for a construction of "substantial portion" to mean enough of the whole so as not to encompass merely an arm or a leg. Given this Court's discussion in *Pierce*, the Eighth Circuit erred in rejecting this definition as "twist[ing] the words of the law and giv[ing] them

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[1] Justice Kennedy took no part in the decision.

a meaning they cannot reasonably bear." *See Stenberg*, 192 F.3d at 1150.

The Eighth Circuit has, in other contexts, used the term "substantial" to mean precisely what Nebraska suggests its own courts might: something close to the whole. Surely when the Eighth Circuit notes that a statute's definition of abortion is "substantially similar to the definition the Supreme Court found constitutional in *Casey*," *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 535 (CA8 1994), or when it explains that the definition of an employer under the ADEA is "substantially the same" as that under Title VII, *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380 (CA8 1995), the court does not mean "substantial" in the "arm or leg" sense but rather in the "almost whole" sense. Moreover, the Eighth Circuit has quoted the Nebraska Supreme Court as interpreting the word "substantial" in precisely this manner:

> While it is difficult to state what the term "substantial performance" or "substantial compliance" as applied to building and construction contracts means, it seems that there is substantial performance of such a contract where all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.

Nathan Constr. Co. v. Fenestra, Inc., 409 F.2d 134, 138 (CA8 1969) (quoting *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742, 748 (Neb. 1961)).

Of course, all of these uses of the term "substantial" are somewhat context-dependent; none discusses what a "substantial portion" of a human body might be. Although the phrase "substantial portion" has been used in connection with the human body in only a few cases, there is nothing to suggest that any court, outside of the partial-birth abortion controversy, has ever used that phrase to mean something so little as an arm or a leg. At least one court has explicitly considered the phrase "substantial portion of the body" in direct opposition to the characterization of a mere arm. *See Thompson-Hayward Chem. Co. v. Peterson*, 56 Ala.App. 432, 435, 322 So.2d 723, 725 (Ala. Civ. App. 1975) ("The Court finds that the plaintiff sustained very serious burns which covered a substantial portion of his body . . . . The defendant contends that the disability is limited to the arm, but the Court finds that the disability extends to the body as a whole . . . ."). Similarly, when a United States District Court states that "[t]he substance unexpectedly and violently exploded, engulfing the plaintiff in flames and severely burning him over a substantial portion of his body," it is difficult to believe that the court means merely an arm or a leg. *Duck v. Gresham-McPherson Oil Co.*, 999 F.Supp. 848, 849 (S.D.Miss. 1998); *see also Hager v. Crepaco, Inc.*, 980 F.Supp. 292, 293 (N.D. Ill. 1997) ("Hager was injured when Clean-in-place ("CIP") machine No. 358 overflowed and splashed lye on a substantial portion of his body."). More important, in the only Nebraska case to use that term in con-

nection with a human body, the court describes pictures as showing injuries to "a substantial portion" of the body, while describing testimony about the same injuries as pertaining to the "entire body." *In Re McCauley*, 3 Neb.App. 474, 477–78, 529 N.W.2d 77, 80–81 (Neb. Ct. App. 1995); *see also State v. Perry*, 124 N.J. 128, 181, 590 A.2d 624, 651 (N.J. 1991) (Stein, J., concurring in part and dissenting in part) (describing a woman who was 60% covered in scalding wounds: "[A] substantial portion of her body showed signs of scalding").

None of these cases, of course, suggests that the term substantial portion as applied to a human body *must* be read to mean something greater than an arm or a leg. They do, however, suggest that the Eighth Circuit was mistaken in ruling that the statutory term "substantial portion" would have to be "twisted" in order to mean something more than an arm or leg. *See Stenberg*, 192 F.3d at 1150. Clearly, "substantial portion" can reasonably bear the meaning for which Nebraska argues.

II. THE EIGHTH CIRCUIT FAILED TO GIVE DUE DEFERENCE TO THE NEBRASKA ATTORNEY GENERAL'S NARROWING INTERPRETATION.

The Nebraska Attorney General has offered a narrow interpretation of the partial-birth abortion statute consistent with the manifest intentions of the Legislature and people of Nebraska. This Court has recognized that federal courts should take heed of interpretations offered by a state's

executive branch or enforcement authorities, so as to avoid needless interference with important state policies. In one case, this Court referred to constructions offered by a State Personnel Board and the State's Attorney General as "authoritative pronouncements" that a federal court should not ignore "in determining the breadth of a statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973). In another case involving an overbreadth challenge to a city ordinance that penalized "picketing before or about the residence or dwelling of any individual," this Court accepted a narrowing interpretation offered by the "counsel for the town at oral argument." *Frisby v. Schultz*, 487 U.S. 474, 477, 483 (1988).

This tradition of deference to state and local enforcement authorities on interpretive questions has a long pedigree. As the Court said in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), "[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered." *Id.* at 795–96 (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)) (emphasis added). *See also Board of Educ. of Rogers v. McCluskey*, 458 U.S. 966 (1982) (deferring to a school board's interpretation of its rules); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162 (1971) (considering a challenge to the constitutionality of questions asked by state bar authorities, and deferring to the state bar's narrowing interpretation of those questions); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 96 (1935) (considering a state tax statute and giving a state tax commissioner's contemporaneous in-

terpretation "respectful consideration"); *United States v. Moore*, 95 U.S. 760, 763 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."); *Hope Clinic v. Ryan*, 195 F.3d 857, 871 (CA7 1999) ("[W]e believe that state courts are entitled to accept the view of both states' Attorneys General that their laws do not forbid, or even affect, the D&E procedure.").

Given this history of deference to state and local enforcement authorities regarding statutory interpretation questions, the Court should recognize the persuasive authority of the Attorney General's opinion construing the Nebraska partial-birth abortion statute as applying only to D&X abortions. Such a recognition of the Attorney General's construction would demonstrate the Court's willingness to give state authorities the respect and deference they deserve on issues peculiarly within their domain.

III. ALLOWING FOR THE NARROWING CONSTRUCTION DOES NOT IMPLICATE THE DANGERS ADDRESSED BY THE OVERBREADTH AND VAGUENESS DOCTRINES.

The traditional concerns underlying the void-for-vagueness doctrine include the fear of a chilling effect due to a failure to provide fair warning to those affected by the law, and the fear of arbitrary and unjust enforcement. As this Court

noted in *Grayned v. Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108–09.

A. Acknowledging a Narrower Scope for the Statute Eliminates Any Lingering Chilling Effect the Law Might Have on Constitutional Conduct.

At least two federal judges have recently suggested that narrowing interpretations of an allegedly vague or overbroad statute do not eliminate the statute's chilling effect. *See, e.g., Hope Clinic v. Ryan*, 195 F.3d 857, 889–90 (CA7 1999) (Posner, J., dissenting) ("And now we can see more clearly one of the fallacies in the 'precautionary' injunction gimmick. It is the existence of these statutes, because of their extraordinary breadth and the limited incentive of a physician to test their scope, not the risk of prosecution, which may indeed be slight, that burdens those abortion rights that are conceded to be constitutionally protected."); *Richmond Med. Ctr. For Women v. Gilmore*, 55 F.Supp.2d 441, 444 (E.D. Va. 1999) ("[A]n important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative . . . . Therefore, when tasked with construing a state law that implicates federally protected rights, a federal court must be cognizant that *an overly narrow, yet non-authoritative, interpretation does not dispel the chilling effect* of the statute's plain terms.") (emphasis added).

The concern about such a chilling effect is misguided, especially with respect to an abortion law that can be construed more narrowly by this Court. These arguments imply that something different happens to the language of the statute if it is limited rather than repealed; put another

way, they suggest that a lingering chilling effect emanates from the terms of the statute if it is merely limited, and therefore to avoid this, the statute should be invalidated entirely. In the first instance, such an argument ignores the practical reality that abortion practitioners are medical specialists who have efficient networks through which they share information and are well-advised of developments in the law. *See, e.g.*, National Abortion Federation, About the National Abortion Federation (visited Feb. 17, 2000) <http://www.prochoice.org/aboutnaf/index.htm> (noting that the NAF "is the professional association of abortion providers in the United States and Canada . . . [which] provides accredited continuing medical education, develops innovative training materials . . . [and provides] legal guidance.") Moreover, abortion practitioners have for many years looked to court opinions, rather than code books, to define the scope of permissible conduct. There is no realistic possibility that a practitioner would read the Nebraska Revised Code and know of the statute—so as to be chilled in her conduct—but simultaneously be unaware of this Court's or the Eighth Circuit's statement that the statute would be unconstitutional if applied to D&E abortion. If such a doctor did exist, however, and was aware of the statute but not aware of the interpreting opinion, the chilling concern would be, *a fortiori*, beyond the court's reach. Courts can invalidate laws, but they cannot repeal them. *See* Richard Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. (forthcoming Apr. 2000) ("A court has no power to remove a statute from the statute books."); *Jawish v. Morlet*, 86 A.2d 96, 97

(D.C. Mun. Ct. App. 1951) (agreeing that "a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished."). Thus, a doctor who was unaware of a narrowing interpretation in a court opinion would be equally unaware of an overruling in a court opinion — if the doctor knew only the statute, that will remain the same, regardless of whether a court upholds, partially upholds, or invalidates the law.

Courts are rarely, if ever, concerned that the words of a completely invalidated statute left on the books will chill constitutional conduct after the court's decision. *Cf.* William Michaels Treanor & Gene B. Sperling, Prospective Overruling and the Revival of "Unconstitutional" Statutes, 93 Colum. L. Rev., 1902, 1922 (1993) (noting "seventeen unenforced but unrepealed pre-Roe criminal abortion statutes" as of 1993). That same equanimity should exist when narrowing, but not invalidating, a statute; both actions will have precisely the same power to eliminate chilling effects. Either the doctor will be aware, and thus will be informed by the court as to what behavior is constitutionally protected, or the doctor will be unaware and informed only by the statute, in which case the court's opinion will not reach her or him in any event.

B. Because the Court Has the Power to Bind All Parties Before It, There Is No Risk of Arbitrary Enforcement with this Statute.

The second concern of the void-for-vagueness doctrine is the fear of arbitrary enforcement. In this case, however, the fear of arbitrary enforcement is without basis in empirical fact. The Nebraska Attorney General – speaking for the state of Nebraska – has provided an interpretation of the statute that limits its prohibition to D&X abortions, *i.e.*, to those abortions in which the fetus is pulled out up to the head before being killed. Thus, even if this statute had never been challenged in court, the chance of enforcement as to D&E abortions would be slim. Moreover, if this Court adopts the Attorney General's interpretation by ruling unconstitutional the application of the Nebraska statute to D&E abortions, then the chance of arbitrary enforcement will be nonexistent. After all, this Court's reach over prosecutors is a constant, regardless of whether it enjoins enforcement of the statute entirely or only partially. *Cf.* Fallon, *supra* (suggesting that the binding power of a court's ruling turns not on whether a challenge is facial or as applied but on doctrines of claim preclusion, issue preclusion, and precedent.) Thus, by accepting the proffered narrowing interpretation and declaring that any broader interpretation would be unconstitutional, this Court can prevent arbitrary enforcement.

IV. GIVEN PROPER DEFERENCE TO LEGISLATIVE FINDINGS OF FACT, THE NARROWING INTERPRETATION OF THE STATUTE DOES NOT CREATE AN UNDUE BURDEN.

If either lower court had accepted the reasonable narrowing interpretation, the only remaining potential ground for invalidation would be the absence of a maternal health exception. But such an exception is unnecessary where safe alternative abortion procedures exist. The District Court determined that the most common late-term abortion procedure was insufficiently safe as an alternative to D&X. In so doing, the District Court erred by disregarding the facts as found by the legislature of Nebraska. Properly deferred to, the legislative facts make clear that, even without a health exception, banning D&X abortions does not create an undue burden under *Casey*.

A. The Nebraska Legislature Made a Reasonable Finding of Fact, Supported by Substantial Evidence, That D&X Abortion Is Never Medically Necessary.

Whether D&X abortions are ever medically necessary is properly an issue of legislative fact. As Judge Posner explained: "The issue is whether the Wisconsin and Illinois 'partial birth' statutes impose an undue burden, and specifically whether they are a threat to maternal health. That is rightly an issue of legislative fact . . . ." *Hope Clinic v. Ryan*, 195 F.3d 857, 885 (CA7 1999).

While Congress and other legislatures may sometimes prefer to state their factual findings explicitly, they are not required to do so. Rather, findings are often implicit or obvious from the text of the law and the legislative history. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[W]e never require a legislature to articulate its reasons for enacting a statute. . . . [T]he absence of legislative facts . . . on the record has no significance . . . .") (internal quotation marks omitted); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.").

It is clear that the Nebraska Legislature found that D&X is never medically necessary to preserve maternal health. The Legislature explicitly considered that such an exception may be constitutionally required if D&X abortion were ever medically necessary. *See* Trial Court Exhibit 30, Floor Debate on LB 23 (June 2, 1997) at 9247 – 48. Legislators offered, debated, and declined to adopt several health exception amendments. *See, e.g., id.* at 6417 (amendment AM1966, proposed May 12, 1997 and defeated 20-11); *id.* at 7758 (amendment AM2325, proposed May 20, 1997 and withdrawn). Indeed, the deliberative process on this issue spanned several months, and included the testimony of numerous experts before the Judiciary Committee. *See generally id.* at 3955-9471. The law passed in its current form with only one dissenting vote. *See id.* at 9471.

The Legislature's finding was reasonable and based on extensive medical evidence. In addition

to both the testimony presented at Judiciary Committee hearings and the protracted floor debate, the Legislature took note of the opinions offered by the medical community within the context of the federal partial birth bill. *See, e.g., id.* at 9425 (discussing AMA support). For example, a panel of ACOG representatives indicated that they could identify no set of circumstances under which D&X was medically necessary, given the availability of alternative procedures. *See Hope Clinic v. Ryan*, 195 F.3d 857, 872 (CA7 1999). A policy statement by the AMA agrees. *See id.* (citing AMA Policy H-5.982). Further, the absence of any peer-reviewed studies comparing the health implications of D&X with other abortion techniques supported the Legislature's judgment that the banned D&X procedure is outside the medical mainstream and is never medically required.

B. Federal Courts Have a Long and Sensible Tradition of According Deference to Legislative Findings of Fact.

Federal courts traditionally accord deference to state and federal legislative findings of fact. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463–65 (1981) ("States are not required to convince the courts of the correctness of their legislative judgments. Rather, those who challenge the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.") (quoting *Vance v. Bradley*, 440 U.S.

93, 111 (1979) (internal quotation marks omitted)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.") (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488–89 (1955)).

It is particularly significant that this type of judicial deference is granted to legislative facts even when fundamental liberties are implicated. *See, e.g., Gregg v. Georgia* 428 U.S. 153, 176 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (noting, in the Eighth Amendment context, the "deference [courts] owe to state legislatures under our federal system."); *Harmelin v. Michigan* 501 U.S. 957, 959 (1991) (noting that under Eighth Amendment "reviewing courts should grant substantial deference to legislative determinations"); *Clover Leaf Creamery*, 449 U.S. at 463–65 (affording deference to legislative facts in Equal Protection case under Fourteenth Amendment); *Turner Broadcasting Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.").

This policy of deference is grounded in a functionally sound understanding of the special institutional competency of legislative bodies. Legislatures enjoy a comparative advantage over courts in making the factual determinations necessary for policy initiatives. Legislatures are equipped

with resources for protracted analysis and empirical study of the many factors affecting public policy initiatives. *See Turner Broadcasting,* 520 U.S. at 195 ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions."); *see also Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (CA4 1995), *vacated on other grounds*, 517 U.S. 1207 (1996) ("[T]he government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court.").

The legislative factfinding process merits special deference in areas in which there is conflict or uncertainty among medical and scientific experts. *See, e.g., Jones v. United States,* 463 U.S. 354, 365 (1983) ("The lesson we have drawn is not that government may not act in the face of this [medical and scientific] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."). Courts have reviewed legislative facts deferentially in the areas of mental health and substance abuse. In fact, this Court recently reiterated its policy of deference to legislatures faced with medical disagreements. Considering a state civil commitment statute enacted amidst medical disagreements over recidivism, the court stated:

> These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws.

> In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. . . As we have explained regarding congressional enactments, when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

Kansas v. Hendricks, 117 S.Ct. 2072, 2081 n.3 (1997) (internal quotation marks omitted).

Although the medical necessity of the D&X procedure has been the subject of disagreement among medical professionals, the legislature of the state of Nebraska overwhelmingly found that it was *not* medically necessary. This is precisely the type of situation in which this Court has consistently urged deference.

Thus this Court's precedents—and the sound logic that supports those precedents—suggest that courts should not lightly disregard legislative findings of fact. Although this Court has yet to establish a required level of deference, the standard announced for deference to legislative facts in *Turner Broadcasting* appears well-suited to the task: the legislature must have made "reasonable inferences based on substantial evidence." *See Turner Broadcasting,* 520 U.S. at 195 (quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994)). This standard calls for more rigorous evaluation than a rational basis test would require, but less than strict scrutiny.

Given that this Court has shown deference to legislative determinations of facts in such a wide variety of sensitive constitutional areas—including, as noted above, the First, Eighth, and Fourteenth Amendments—this standard should be adopted in the instant case. Because Nebraska's factual findings were reasonable and supported by substantial evidence, they merit deference.

C. When the Legislative Finding Is Accepted, the Statute Needs No Health Exception and Does Not Impose an Undue Burden.

Given the availability of other safe and widely-accepted abortion procedures, a ban on D&X abortions does not impose an undue burden and should not require a health exception. If D&X is never medically necessary, then providing a health exception achieves no gain for women; no constitutional liberties are advanced by adding a provision that can never be invoked. The statute would be internally contradictory, and such an exception would be mere surplusage. This Court has repeatedly noted that it has "a duty to give effect, if possible, to every clause and word of a statute." *Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 103 (1989) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)). In light of this practice, it is difficult to believe that the Constitution requires the insertion of a meaningless provision.

This reasoning is confirmed by this Court's decision in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upholding Mont. Code Ann. § 50-20-109

(1995)). There, the Court upheld a requirement that abortions be performed by licensed physicians without even mentioning the fact that the law contained no exception for the life or health of the mother. *See* Mont. Code Ann. 50-20-109 (1995). Presumably, the Court allowed the statute to stand without such an exception because it implicitly found that it would not be in the interests of the mother to have abortions performed by a non-physician. Alternatively, it is possible that the Court felt that, even if there were situations in which it would be in the mothers' interests, those situations were so rare as to present no undue burden under *Casey*. Either rationale supports upholding the D&X ban without a health exception: because D&X was found by the legislature never to be medically necessary, omitting an exception is constitutionally permissible and is not an undue burden under *Casey*.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the judgments of the District Court and Court of Appeals.

Respectfully submitted,

Dwight G. Duncan
Counsel of Record
333 Faunce Corner Road
North Dartmouth, MA 02747-1252
508-998-9600 ext. 124

Mary Ann Glendon
1575 Massachusetts Avenue
Cambridge, MA 02138

Maryclare Flynn
529 Main Street
Boston, MA 02129